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RE-SHAMING THE DEBATE: SOCIAL NORMS, SHAME, AND REGULATION IN AN INTERNET AGE

KATE KLONICK*

Advances in technological communication have dramatically changed the ways in which social norm enforcement is used to constrain behavior. Nowhere is this more powerfully demonstrated than through current events around online shaming and cyber harassment. Low cost, anonymous, instant, and ubiquitous access to the Internet has removed most—if not all—of the natural checks on shaming. The result is norm enforcement that is indeterminate, uncalibrated, and often tips into behavior punishable in its own right—thus generating a debate over whether the state should intervene to curb online shaming and cyber harassment.

A few years before this change in technology, a group of legal scholars debated just the opposite, discussing the value of harnessing the power of social norm enforcement through shaming by using state shaming sanctions as a more efficient means of criminal punishment. Though the idea was discarded, many of their concerns were prescient and can inform today's inverted new inquiry: whether the state should create limits on shaming and cyber bullying. Perhaps more importantly, the debate reintroduces the notion of thinking of shaming within the framework of social norm enforcement, thus clarifying the taxonomy of online shaming, cyber bullying, and cyber harassment.

This Article ties together the current conversation around online shaming, cyber bullying, and cyber harassment with the larger legal discussion on social norms and shaming sanctions. It argues that the introduction of the Internet has altered the social conditions in which people speak and thus changed the way we perceive and enforce social norms. Accordingly, online shaming is (1) an over-determined punishment with indeterminate social meaning; (2) not a calibrated or measured form of

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punishment; and (3) of little or questionable accuracy in who and what it punishes.

In reframing this problem, this Article looks at the viability of the legal, normative, private, and state solutions to controlling online shaming. It argues that looking only to state regulation will be an inefficient and ineffective solution. Instead, it proposes using the realizations from the shame debate, successful uses of online norm enforcement, and private remedies to inform the debate around state intervention.

INTRODUCTION

At Pycon, a tech developers' conference in California, two men—Bob Smith and Fred Jones¹—sat in the audience at a presentation about “dongles,” devices that attach externally to computers and mobile devices. With a giggle, Smith turned to Jones and muttered a half-thought-out joke about “big dongles” and “forking someone’s repo.”² “It was so bad, I don’t remember the exact words,” he later said. “[Something] about a fictitious piece of hardware that has a really big dongle—a ridiculous dongle. . . . It wasn’t even conversation-level volume.”³ The “joke” was overheard by a woman in the row in front of them, who stood up, turned around, and took their photograph. She then tweeted the picture to her 9,209 followers with the subtitle, “Not cool. Jokes about forking repo’s in a sexual way and ‘big’ dongles. Right behind me #pycon.”⁴

The woman who took the photo, a thirty-something black Jewish developer named Adria Richards, followed the Tweet up the next day with a blog-post discussing the photo and the importance of accountability for “antinormative” behavior.⁵ In part because of the public outrage generated by Richards’s posts, Smith was fired.⁶

Following his firing, Smith issued a public explanation and apology on another message board news site.⁷ In response, Smith started receiving

1. Bob Smith and Fred Jones are pseudonyms; both men’s real identities remain anonymous.

2. Forking in tech talk means to copy another person’s software so you can work on it independently, change, and ideally improve on it. The phrase “forking someone’s repo” is both a type of semi-flattery (in that imitation is flattery) and sexual euphemism (that is, exploiting another’s work entirely for your own benefit, with no benefit to them).

3. JON RONSON, *SO YOU’VE BEEN PUBLICLY SHAMED* 112 (2015).

4. Adria Richards (@adriarichards), TWITTER (Mar. 17, 2015, 5:32 PM), <https://twitter.com/adriarichards/status/313417655879102464/photo/1>.

5. Adria Richards, *Forking and Dongle Jokes Don’t Belong at Tech Conferences, BUT YOU’RE A GIRL* (Mar. 18, 2013, 9:36 PM), <http://butyoureagirl.com/2013/03/18/adria-richards-on-dongle-jokes-and-pycon-2013/>.

6. RONSON, *supra* note 3, at 116.

7. mr-hank, HACKER NEWS (Mar. 2013), <https://news.ycombinator.com/item?id=5398681>.

notes and gestures of support from various people who had been watching the events unfold online. Richards, however, had started to receive the opposite: “A father of three is out of a job because a silly joke he was telling a friend was overheard by someone with more power than sense. Let’s crucify this cunt.”⁸

Though Richards had initially enjoyed the positive attention from feminist and activists online for her post, she was now faced with a horrendous backlash. Anonymous users sent violent pictures and threats of rape, kidnap, torture, and death via email and posted them on Internet message boards and comments.⁹ Richards’s employer was targeted by a distributed denial of service (“DdoS”) attack, which crippled their website and servers. A group of anonymous attackers communicated the ransom: fire Richards, or the attacks will continue. She was fired the next day; over a year later, she still does not have a job.¹⁰

Richards’s and Smith’s stories demonstrate how low cost, anonymous, instant, and easy access to the Internet has eviscerated whatever “natural” limits there were to public shaming and has served to amplify its effects.¹¹ Now, any perceived violation of a social norm—a racist tweet,¹² a sexist joke, taking up too much room on public transportation¹³—can result in immediate, prolific condemnation from millions of people all over the world. Today, it is easier than ever to use shaming to enforce so-called social norms, and it is easier than ever for shaming to spin out of control.

But these effects were not always so obvious. Two decades before Smith and Richards were each shamed out of their employment, a number of legal scholars debated the possible merits of using government-sponsored shaming sanctions as an alternative to imprisonment for non-violent low-level offenses. The debate, which grew out of a general interest at that time in using social norms to regulate, began with a paper by Professor Dan Kahan, which proposed shaming as an expressive and functional replacement to imprisonment, but at far less cost.¹⁴

Taking place in the mid-1990s during a time largely innocent of the Internet, the debate that followed was in many ways prescient of the problems that would occur with online shaming. Professors James Whitman and Eric Posner argued that shaming would create an

8. RONSON, *supra* note 3, at 120.

9. *Id.* at 120.

10. *Id.*

11. See, e.g., Lawrence Lessig, *Social Norms, Social Meaning, and the Economic Analysis of Law: The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998); see *infra* Part I.

12. See *infra* Part II.

13. See *infra* Part IV (describing “manspreading”).

14. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

uncontrollable spiral into mob justice.¹⁵ Professor Martha Nussbaum argued that shaming sanctions were contrary to human dignity, and instead, acts should be shamed, not people.¹⁶ Finally, Kahan, a decade after his initial article, recanted his previous position, claiming shaming was not as over-determined as prison and therefore less attractive to society.¹⁷

A more thorough explanation of modern shaming, cyber bullying, cyber harassment, and social norms and a detailed analysis of the work from these scholars is included in Part I of this Article.

In the ten years since the debate ended, public shaming as a means of enforcing social norms—totally separate from government-endorsed shaming sanctions—has continued, but changed dramatically. Through a series of examples, Part II descriptively demonstrates how the rise of inexpensive, anonymous, instant, and easily accessible communication technology has removed natural limits on shaming. The result is norm enforcement that is indeterminate, uncalibrated, and often tips into behavior punishable in its own right.

Part III examines how the Internet and modern technology have altered the social conditions in which we speak and, in turn, changed how we enforce social norms. Viewed within this framework of social norm enforcement, the modern examples of online shaming and harassment in Part II demonstrate that online shaming: (1) is an over-determined punishment with indeterminate social meaning; (2) is not a calibrated or measured form of punishment; and (3) is of little or questionable accuracy as to who and what it punishes.

With the debate thus reframed, Part IV will look at the viability of various proposed legal, normative, private, and state methods of controlling public shaming. The question of the prudence of these limits—or their feasibility and necessity—brings us to a new modern iteration in the debate over norms, norm enforcement, and state action in an Internet era. This Article argues that looking only to state regulation will be an inefficient and ineffective solution to unfettered norm enforcement. Instead, it proposes using the realizations from the shame debate, successful uses of online norm enforcement, and private remedies to inform the debate around state intervention.

15. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 93, 109 (2000); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060–68 (1998).

16. See generally MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 230–33 (2004); see also Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2179 (2001).

17. Dan M. Kahan, *What's Really Wrong with Shaming Sanctions?*, 84 TEX. L. REV. 2075 (2006).

I. OVERVIEW OF SOCIAL NORMS, SOCIAL MEANING, AND SHAMING

A. *Modern Shaming, Modern Harassment*

For such a recognizable emotion, defining shame is a surprisingly difficult task.¹⁸ Though there are disagreements on whether shame is related to disgust or embarrassment; a stigma or a result of a stigma; or the outcome of insult to human dignity, it can be generally agreed on as an unpleasant feeling that results from awareness that one has engaged in wrong or socially transgressive behavior.¹⁹ Shame is different than guilt or embarrassment, which can be considered internal and self-enforced feelings following bad behavior; shame is external and enforced socially.²⁰

Stories of people using shame to punish unfavorable behavior fill myths, stories, and art the world over. In Greek myth, Myrrha was shamed and turned into a tree when she tricked her father into an incestuous union.²¹ In the Danish fairytale, “The Red Shoes,” a vain girl who insists on wearing ostentatious red shoes to church is then forced to wear them forever and dance continuously to her death.²² And of course, Nathaniel Hawthorne forever linked a scarlet “A” to adulterous women in America.²³

Such stories are not confined to fiction or to history. In Kabul, a man accused of illicit sex was paraded through the streets.²⁴ In China, prostitutes and other criminals are forced to parade publicly, and it is now common practice to require criminals to confess and atone on television before their trials.²⁵ And in America, publishing the names of prostitutes’

18. For example, see generally the lengthy discussion of shame in NUSSBAUM, *supra* note 16; ANDREW P. MORRISON, *THE CULTURE OF SHAME* (1986); FRANCIS BROUCEK, *SHAME AND SELF* (1991), and of course the work of the participants in the debate discussed *infra* Part I.C.

19. The Oxford English Dictionary definition of shame lists it first as “a painful feeling of humiliation or distress caused by the consciousness of wrong or foolish behavior.” *Shame*, OXFORD ENGLISH DICTIONARY (3d ed. 2011).

20. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 677–79 (1986) (discussing the role of norms and their enforcement via shame, in extralegal dispute resolutions).

21. OVID, *METAMORPHOSES* BOOK X, 298–502 (Anthony S. Kline, trans., 2000) (c.8 C.E).

22. HANS CHRISTIAN ANDERSEN, *The Red Shoes* in HANS CHRISTIAN ANDERSEN’S COMPLETE FAIRY TALES (Wordsworth Editions 1998) (1845).

23. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Classic Books International 2009) (1850).

24. See Whitman, *supra* note 15, at n.6 (citing Terence White, *Man Accused of Illicit Sex Paraded through Kabul Streets*, AGENCE FRANCE PRESSE, Dec. 14, 1996).

25. Andrew Jacobs, *China Seeks to End Public Shaming*, N.Y. TIMES (July 27, 2010), http://www.nytimes.com/2010/07/28/world/asia/28china.html?_r=0; Anne Namam, *Taking It to the Screens, Beijing TV Confronts the City’s Street Criminals*, ASIA WEEK (July 19, 1996), <http://edition.cnn.com/ASIANOW/asiaweek/96/0719/feat2.html>; Megha Rajagopalan, *TV Confessions in China an Unsettling New Trend for Executives*, REUTERS (Sept. 1, 2013), <http://www.reuters.com/article/us-china-confessions-idUSBRE9800HJ20130901>.

johns, or ordering those convicted of drunk driving to put bumper stickers on their cars declaring their crime, have continually made scattered appearances as court-ordered punishment.²⁶

One might wonder where shaming stops and bullying or harassment begins. Bullying is generally understood among academics and educators as having to meet three criteria: (1) it must be verbal or physical aggression; (2) it must be repeated over time; and (3) it must involve a power differential.²⁷ When talking about cyber bullying, the aggression is mostly verbal; using “threats, blackmail . . . gossip and rumors” and online personas or messages can be more cruel, vindictive, and mean.²⁸ Cyber bullying also typically describes acts between children, but the same acts by adults could be considered cyber harassment.

At least in part, cyber harassment “involves threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks.”²⁹ Though all of these things would also fall under a simple legal definition of harassment or abuse, the “cyber” distinction adds a critical element: the way in which “the Internet exacerbates the injuries suffered. . . by extend[ing] the life of destructive posts.”³⁰

So what makes online shaming³¹ different from cyber bullying or cyber harassment? Just like cyber bullying or harassment, it often involves repeated verbal aggression over time, but it has another key element: shaming also involves the attempt to enforce either a real, or perceived, violation of a social norm. Online shaming often turns into cyber bullying and harassment the more attenuated the social actions become from the nexus of social norm enforcement. Thus, an essay deriding a young girl for smiling in a selfie at Auschwitz might be considered shaming; anonymous emails sent three weeks later calling for the girl to die, be raped, or kill herself would be better considered cyber harassment.

The definition of shaming hinges on social norms, but what is meant by social norms exactly? The following Part briefly examines their use in

26. For a more thorough list of these types of crimes see Whitman, *supra* note 15, at 1061 and Kahan, *supra* note 14, at 631–32.

27. EMILY BAZELON, *STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY* 28 (2013) (citing DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 142–52 (1993)).

28. BAZELON, *supra* note 27, at 33–34 (citing Patricia A. Snell & Elizabeth K. Englander, *Cyberbullying Victimization and Behaviors Among Girls: Applying Research Findings in the Field*, 6 J. SOC. SCI. 510–14 (2010)).

29. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 3 (2014).

30. *Id.* at 4.

31. I will use the term “online shaming” to refer to what is often called “public shaming” by the popular press.

the law, and then how it was once imagined that shaming could be used as a tool by the state.

B. Social Norms and Social Meaning

Though norms had long been studied by sociologists, anthropologists, and economists, their identification and utility in the law is credited as being first realized by Professor Robert Ellickson in a 1986 article about cattle rangers in Shasta County, California,³² and expounded in a book he published in 1991.³³ By the mid-1990s, the idea had been taken up by law-and-economics scholars hypothesizing on the creation and use of social norms in modern regulation.³⁴

Though perhaps differing at the margins, there appears at least to be consensus around the definition and function of a social norm among these scholars.³⁵ A social norm is a rule without an official source (like the government) enforced without the threat of any kind of official sanction (legal action), yet complied with, nonetheless.³⁶ An individual's compliance with the norm can be enforced externally by third parties, or internally by one's self.³⁷ Norms can be internalized and self-enforced, so that no third-party action is needed for them to be perpetuated.³⁸ Self-enforcement might be individual feelings of guilt or embarrassment for norm violation; or it could be feelings of elation or joy for norm compliance.³⁹ As already discussed, external enforcement for norm violation might be shaming or ostracizing the violator from the group; or it could be honoring an individual for compliance with the norm.

Norms and the law interact in three distinct ways to inform individual behavior:

(1) *Non-legal norms.* These are the unwritten codes that maintain civility and order in various pockets of society: the courtesy of giving your seat to an elderly person on the subway, flushing a public toilet after use, or walking up or down on the right side of stairs. There is no legal or

32. See Ellickson, *supra* note 20, at 672–73.

33. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

34. Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 3 (2001).

35. *Id.*

36. Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997). Put in another, more active way, social norms are rules “governing an individual’s behavior that third parties other than state agents diffusely enforce by means of social sanctions.” Ellickson, *supra* note 34, at 3.

37. Posner, *supra* note 36.

38. *Id.*

39. Ellickson, *supra* note 34, at 3; see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 345–50 (1997) (on esteem-based norms).

government punishment for violating these norms, only an individual's internal enforcement, or enforcement on a violating individual by a third party.

(2) *Norm-informing law*. These are the codes of conduct or behavior that are enforceable both through the law and through external or internal enforcement: theft, drunk driving, and paying your taxes, are some examples. Violating these laws (and consequently the norms that underlie them) results in legal punishment, which can be a proxy enforcer for the norms, or a complement enforcer to internal or third-party enforcement.

(3) *Law-informing norms*. Laws can also nudge norms in new directions. This is seen with the rise in norms against racism, smoking, and judging stay-at-home dads.⁴⁰

At the same time that scholars began to discuss norms, they also began developing and discussing the concurrent idea of social meaning.⁴¹ A social norm is a standard that society generates to govern the behavior of its members.⁴² Social meaning is the converse: an act's social meaning is determined by its relationship with society's norms.⁴³ Social meanings and social norms thus depend on each other. Social norms function largely because people understand the social meaning of actions that deviate or comply with social norms. Society then punishes, or rewards, deviance or compliance with its norms by identifying the social meaning of certain acts and compelling individuals to comply with them. In this way, social norms allow society to compel individuals to behave in certain ways by attaching social meanings to various actions they take.⁴⁴

Norms, it was thus argued, could—or did—create order without law.⁴⁵ For legal economists, the “discovery” of norms and their role in legal analysis was akin to finding a vast untapped resource.⁴⁶ In contrast to the expense of passing cumbersome government regulation and putting enforcement mechanisms in place, perhaps already-existing norms could be

40. See McAdams, *supra* note 39; see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (discussing the role of law on changing norms around smoking, gender roles, and race).

41. See McAdams, *supra* note 39.

42. Lessig, *supra* note 11, at 680–81.

43. *Id.*

44. Not everyone believes that the distinction between social norms and social meaning is a worthwhile one. For a thoughtful critique, see RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015), at 165–68.

45. Indeed, this was the title of the foundational book on the subject. See ELLICKSON, *supra* note 33.

46. Ellickson called it a “boomlet” in interest around norms. Ellickson, *supra* note 34, at 3; see also, McAdams, *supra* note 39, at 344–47.

exploited as an independent and more efficient source of regulation.⁴⁷ Perhaps—in the right context—the law could even free ride on norms.

C. *Shaming Sanctions Debate*

It was this idea of piggybacking on social norms to more efficiently achieve the goals of regulation that began the debate around shaming sanctions. The players in this debate, and their relevant scholarship, are summarized in loose chronological fashion below.

1. *Kahan 1.0*

The goal of *What Do Alternative Sanctions Mean?*—as expressed by the author, Dan M. Kahan⁴⁸—was not simply to support shaming punishments in place of prison, but rather to put forth social meaning⁴⁹ as a necessary element to successful use of alternative sanctions.⁵⁰

To do this, Kahan (hereinafter Kahan 1.0) puzzled over America's dependence on the prison system as a form of punishment. If alternative sanctions like fines and community service were accepted⁵¹ as doing as good of a job deterring nonviolent offenders as prison, why were we still locking up our cheating bankers and drunk drivers? What was it about imprisonment that Americans liked so much that they were willing to pay so much for it, even when better options were available?⁵²

Kahan 1.0 theorized the answer was that imprisonment played a more powerful *expressive* role in punishment, and therefore, it offered something extra that punishment like fines or community service did not.⁵³ That expressive role, he theorized, was society's "condemnation,"⁵⁴ or "moral disapprobation"⁵⁵ of the offender's act. Thus, society is willing to accept a higher price tag to punish certain crimes, even where community service or fines would provide similar deterrence, for the expressive value it provides.⁵⁶

47. See Kahan, *supra* note 14; see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV 943 (1995).

48. See Kahan, *supra* note 17, at 2077–81 (discussing and analyzing his original work from ten years prior).

49. *Id.*

50. See generally Kahan, *supra* note 14.

51. *Id.* at 605–30.

52. *Id.* at 592.

53. *Id.* at 635–37.

54. *Id.* at 606.

55. Kahan, *supra* note 17, at 2077.

56. Kahan, *supra* note 14, at 617–30.

The solution to this inefficiency, Kahan 1.0 proposed, could be found in shaming sanctions. Shaming could be a “perfect cocktail” of alternative sanctions at a much lower cost than imprisonment, but with all the expressive satisfaction.⁵⁷ The form that such shaming could take was split roughly into four categories: (1) Public Stigmatizing (an ad in a newspaper stating a domestic abuser beats women); (2) Literal Stigmatizing (a bumper sticker stating the driver was convicted of a DWI); (3) Self-Abasement (a ceremony or ritual publicly disgracing the offender); and (4) Contrition (forcing the violator to apologize).⁵⁸ In such a way, judges or lawmakers handing out shaming sanctions would be capitalizing on established social norms and methods of denunciation. Thus, shaming sanctions, Kahan 1.0 argued, could be the solution to over-imprisonment that previous alternative sanctions could never be.

2. Massaro

Writing in response to Kahan 1.0, Toni M. Massaro surveyed the “current”⁵⁹ state of shame and shaming, looking to psychology, sociology, and culture before discussing its implications on legal reforms.⁶⁰ Her critique was twofold, challenging first Kahan 1.0’s assumption that shaming sanctions would be as effective as imprisonment, and then his failure to take into account the effect shaming punishments might have on culture and government.⁶¹

As to the former—the “Efficacy Concerns”—Massaro claimed that shaming punishments entailed far-too-many unknown variables to be reliable as a specific deterrent. The power of a stigmatic shaming penalty to change an individual’s behavior would be highly dependent on the offender, the community the offender was shamed in, and the underlying crime.⁶² A gang leader, for example, might feel little or nothing at being forced to wear a sign labeling him as a drug trafficker in an already high-crime neighborhood.

Massaro also cast doubt on the effectiveness of shaming penalties as general deterrence.⁶³ In addition to the instability and unpredictability reasons above, she theorized that the current structure of modern society— “[w]e (collectively) are not Victorian England, the Colonies, or pre-World

57. *Id.* at 635–41; *see also* Kahan, *supra* note 17, at 2075.

58. Kahan, *supra* note 14, at 631–34.

59. “Current” being 1996.

60. Toni M. Massaro, *The Meanings of Shame*, 3 PSYCHOL. PUB. POL’Y & L. 645, 645–89 (1997).

61. *Id.* at 692–704.

62. *Id.* at 692–93.

63. *Id.* at 693–94.

War II Japan”—would make shaming ineffective.⁶⁴ The lack of community conditions like neighbor-to-neighbor contact would mean that a shaming punishment might not actually have a shaming effect at all.⁶⁵

Massaro also pointed out that shaming sanctions did not take into account “private responses to the public penalty.”⁶⁶ Prison, fines, and community service all had set endpoints—but shaming could have infinite impacts. This made shaming not only difficult to calibrate as a proportional penalty to the crime, but also a possible impediment to an offender’s re-integration into society.⁶⁷

Finally, Massaro discussed the alternative long-term reactions to shame: some offenders, once being shamed, might have violent secondary effects. Feeling shamed by a community might create feelings of ostracization and ultimately encourage the offender to continue to act against the norms, or they might simply act violently out of anger.⁶⁸ Conversely, over time and frequency of use, shaming might simply become ubiquitous and lose its power as a tool of enforcing norms.⁶⁹

As to the latter of Massaro’s two main critiques—the “Social and Political Concerns”—she hypothesized more broadly to the long-term effects of shaming penalties on society. Centrally, that official shaming would “erode decency norms” by normalizing cruelty through state action.⁷⁰ Shaming might make certain offenders subject to them—perhaps drunk drivers, white-collar criminals, child molesters—less than human.⁷¹ Shame’s close—or complementary—relationship with humiliation disgraces human dignity. It is ultimately “the rejection of human beings as human.”⁷²

3. *Whitman*

Weighing in on the debate, James Q. Whitman cataloged and then analyzed what he found to be the most salient and relevant arguments against shaming sanctions. He first discarded two of Massaro’s central ideas: that shaming sanctions cannot be effective in a modern society; and that shaming sanctions are bad because they are contrary to human

64. *Id.*

65. For a more detailed analysis of this problem with shaming—its ineffectiveness in modern society—see Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

66. See Massaro, *supra* note 60, at 694.

67. *Id.*

68. *Id.*

69. *Id.* at 694–95.

70. *Id.* at 699.

71. *Id.* at 700.

72. *Id.* (citing AVISHAI MARGALIT, *THE DECENT SOCIETY* 1 (1996)).

dignity.⁷³ Arguments that shaming sanctions will not work, he argued, are already disproven by modern courts' continual reliance on them because of their very effectiveness.⁷⁴ As to claims of shaming's impact on human dignity, Whitman decoupled "dignity" from a definition in a broad human rights-based sense and traced it instead to a Victorian tradition of bodily dignity, which he argued as the dignity impacted by shaming.⁷⁵ This dignity, he stated, "is gone throughout society" and thus, an ineffective claim against the use of shaming sanctions today.⁷⁶

Assuming these premises, Whitman broached what he described as the two "political" arguments against shaming: the "liberal" argument that the state cannot inflict shaming sanctions even if they are effective, because moral coercion should be privately enforced; and the "statist" argument that the state can use shaming sanctions, but should not, because it could incite mob riots and a loss of state control.⁷⁷

The liberal argument Whitman derived from classical liberalism—Rousseau to Mill—found shame to be a highly effective tool, but one that could only be wielded by the people.⁷⁸ In other words, it was not the scarlet "A" itself that caused the shame, it was the public opinion about what that scarlet "A" represented—a judgment that would be present with or without the state-sponsored signage.⁷⁹ While recognizing the truth in this, Whitman cast doubt on the theory's modern applicability in an age with mass media and politics: "It is difficult, in light of some hard experience, to believe that the state cannot succeed in destroying reputations."⁸⁰ Finally, Whitman argued that "statist" arguments—that public shaming sanctions might incite mob rioting—address a dangerous reality to shaming sanctions, but that government cannot shirk from action merely because of a fear of riots.⁸¹

Having taken on each argument against shaming sanctions, Whitman made his most convincing assessment of their danger: that shaming sanctions "involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace."⁸² The menace in "lynch justice," he argued, is not only its subjectivity to the mercurial whims of a mob, but its potential to subject

73. Whitman, *supra* note 15, at 1062–68.

74. *Id.* at 1068.

75. *Id.* at 1070–79.

76. *Id.* at 1079.

77. *Id.*

78. *Id.* at 1085–86.

79. At the risk of cross-pollinating arguments, this assessment supports, without specifically saying so, the idea of social meaning put forth by Kahan and Lessig.

80. Whitman, *supra* note 15, at 1088.

81. *Id.* at 1085.

82. *Id.* at 1088.

the offender to unending punishment.⁸³ Whitman called this potential infinite punishment by the mob, a violation of “transactional dignity”—a dignity he claimed arises from our belief that one should be able to “pay off a debt once and for all and be done with our creditor.”⁸⁴ Shame sanctions’ danger, then, was that they undermined an “ethic of restraint and sobriety” as well as a sense of “measured punishment.”⁸⁵

4. Posner

In *Law and Social Norms*, Eric Posner took a historical look at shaming penalties, and argued that they have often proven unreliable.⁸⁶ Similar to those arguments made by Massaro, Posner discussed the imprecision of being able to calculate the effect of shame on any one individual’s reputation but added a secondary level of complication: the imprecision of a third-party’s desire to punish certain crimes.⁸⁷ The primary motive to shame, Posner argued, is not justice, but rather enhancing one’s own reputation.⁸⁸ This leads people to join in shaming not just to deter future norm violation, but also to bolster their own worth in the eyes of the community—or, as is seen in the example of organized crime, to join the group to avoid its ire being turned on you.⁸⁹

Additionally, Posner argued, shaming often has undesirable spillover effects on innocents. Such is the case when the family of an offender is also shamed, even when they had no role in the violation.⁹⁰ This high level of variance, he claimed, does not mean that shaming punishments are ineffective, but rather that “the ‘average’ shaming punishment is not likely to produce the optimal level of deterrence at the margin.”⁹¹

Posner also claimed that shaming punishments would create deviant sub-communities. Using the example of prostitution, he suggests that those offenders who value visiting prostitutes more than they do the potential cost of shaming, will continue to engage in the behavior—and when caught, and shamed, will either be forced to “turn to a life of crime” and/or form a sub-community.⁹² If the punishment for prostitution is not shaming, but

83. *Id.* at 1089.

84. *Id.* at 1090. It is worth noting, and as will become relevant in Part III *infra*, that this argument is similar to the point made by Massaro, *supra* note 60, at 694.

85. Whitman, *supra* note 15, at 1091.

86. POSNER, *supra* note 15, at 93.

87. *Id.* at 92.

88. *Id.*

89. *Id.*

90. See cuckolding and adultery or Bernie Madoff.

91. POSNER, *supra* note 15, at 94.

92. *Id.* at 102.

imprisonment, Posner posited, those members will be removed from the dominant population without the risk of the creation of a sub-community.⁹³

Posner's issues with shaming sanctions differ from other theorists in fact, but not theory. The heart of Posner's two claims—that shaming sanctions are messy and create undesirable externalities—is quite similar to that expressed by Massaro and Whitman, and the problem of the government being unable to control “the level of ostracism that it provokes.”⁹⁴

5. Nussbaum

In her 2004 book *Hiding Humanity*, Martha C. Nussbaum devoted a chapter to the specific question of shaming citizens and dismantling the argument for government shaming sanctions.⁹⁵ To wit:

The fact that the state is complicit in the shaming makes a large difference. People will continue to stigmatize other people, and criminals are bound to be among those stigmatized. For the state to participate in this humiliation, however, is profoundly subversive of the ideas of equality and dignity on which liberal society is based.⁹⁶

Five distilled arguments, many of which have already been surveyed here, are cited to bolster her point. First, Massaro's argument that shame penalties diminish human dignity; then Whitman's stance that shaming penalties would lead to an anarchist mob justice; third, Posner's position that shame punishments are simply too unreliable to be a government position; then again, the arguably “dignity”-based argument that shame-based deterrents would “break the spirit” of offenders;⁹⁷ and finally, that shame-based penalties would ultimately just be one more form of ever-increasing government control.⁹⁸

From this panoply, Nussbaum laid the most consequential weight with the question of shaming sanctions' impact on human dignity: that shaming sanctions will inevitably inflict their greatest weight on “vulnerable minorities,” a particularized example of a greater problem of shaming penalties' effects on individual dignity.⁹⁹ Nussbaum also argues that shaming is too harsh to use in a civilized society because it targets the

93. *Id.* at 95.

94. *Id.*

95. NUSSBAUM, *supra* note 16, at 222–79.

96. *Id.* at 232.

97. *Id.* at 236. Nussbaum relies here on Steven Schulhofer, but I believe this argument is just another variant on the dignity argument professed by Massaro and already acknowledged by Nussbaum.

98. *Id.* at 230–36.

99. *Id.* at 278–79.

person (“you are bad”) instead of the person’s acts (“you did a bad thing”) and thus “marks” a person “defective” in society with a degraded identity.¹⁰⁰

6. *Kahan 2.0*

In 2006, ten years after his proposal for shaming as an alternative sanction in place of imprisonment for low-level offenses, Kahan recanted.¹⁰¹ Setting aside the arguments of his detractors, he acknowledged that shame was “an unacceptable alternative sanction” for much of society—though for completely separate reasons than his critics had put forth.¹⁰² The *true* problem with shame sanctions, Kahan (hereinafter Kahan 2.0) argued, was that humans liked to shield or hide their desire for expressive punishment, and while imprisonment accounts for this, shaming punishments do not.¹⁰³ Imprisonment, in its blanket and multipurpose punitive capacity, was “expressively over determined”—and thus many different types of people, from all walks of life, could find whatever meaning and affirmation of their values from that punishment.¹⁰⁴

Explained differently, when Person A is sent to prison for X offense, the possible reasons for sending her to prison are multiple and their application inexact: Person A might be in prison for rehabilitation, or specific deterrence, or general deterrence, or retribution, or some combination of all of the above. The punishment of prison does not have a single determinate meaning—it is “over determined.”

But the same is not true of the punishment of shaming. While shaming can be a punishment in search of future deterrence, the most blatant social meaning of shaming is group retribution; or as Kahan 2.0 puts it: a highly expressive and determined punishment. Thus, by providing this slightly circular formulation, Kahan 2.0 gives the “real” reason shaming sanctions will not work: people favor prison to shaming because prison gives people a wider range of motives to hide behind than shaming gives.

In the context of modern-day online shaming, the shame sanctions debate is more than a simple, somewhat ironic, historic hook—“Once we talked about the government *using* shame, now we’re talking about the government *curbing* shame!”—it is actually a valuable study of the role shaming has had in our society and the role it plays in enforcing a

100. *Id.*

101. Kahan, *supra* note 17.

102. *Id.* at 2076.

103. *Id.* at 2085–86.

104. *Id.* at 2085 (citing Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 586–606 (2006)).

normative culture. By thinking of shaming within the framework of social norm enforcement, the impact of the Internet can be better understood and the taxonomy of online shaming, cyber bullying, and cyber harassment can make more sense.

The next Part sets the stage for that discussion. Part II examines how the low-cost, ubiquitous, anonymous, and instant nature of the Internet has changed the natural limits on shaming and how it functions as social-norm enforcement in modern society.

II. SHAMING AND THE INTERNET

The Internet is a normative place. That it would be such was envisioned by the Father of Social Norms, Robert Ellickson, in a response piece in the midst of the shame debate: “The fierce and (so far) largely successful resistance to government regulation of those involved with the Internet illustrates how members of a significant new social group have opted to make norms, not law, their social-control instrument of choice.”¹⁰⁵

Ellickson’s observation was and continues to be correct: norms are the primary social control mechanism of the Internet.¹⁰⁶ The far greater change, however, is that the Internet has altered the “social conditions in which people speak” and thus changed the way we perceive and enforce social norms.¹⁰⁷

Before the Internet, if a woman in Des Moines decided to steal all the sugar packets at a restaurant and then empty the salt and pepper shakers into a bag in her purse, she might be given a sideways glare by patrons and brusque treatment from the waitress, and, at worst, asked to leave. Today, a twelve-year-old can capture the freeriding café patron in a fifteen-second video, upload it to Facebook, and tell the whole town, the whole city, the whole country, the whole world: “GOT SALT AND PEPPER?! LOL MS. SMITH IS HOARDER.” A banker in New York can watch the video on

105. Robert Ellickson, *Social Norms, Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 551 (1998).

106. It is worth briefly noting that Massaro also touched on the role of the Internet in shaming, but perhaps less presciently. First, that shaming would be ineffective in modern society because “[i]n a mobile, anonymous, urban society, shaming may not be read by the public as any coherent, collective community statement about its norms. In fact it may not be read at all by some citizens.” Massaro, *supra* note 60, at 695. And second, that the lack of cultural conditions like neighbor-to-neighbor contact seen in historically in Colonial or post-World II Japanese societies, would no longer be present in modern times and thus render shaming ineffective. *Id.* While it might be true that we have less neighbor-to-neighbor interaction in a borrow-a-cup-of-sugar-sense that decline has certainly not led to interactive isolation. In fact, it would seem that the Internet has in fact made the entire world neighbors (though anonymous ones) and also accentuated and amplified both how and to what effect neighbor-to-neighbor shaming might take place.

107. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2 (2004).

YouTube, type in a comment under his anonymous handle, and add: “crazy bitch!” before forwarding it to twenty of his closest friends. The woman’s identity and actions can circulate indefinitely around the Internet.

This example, and the next three true stories, demonstrate three things about online shaming:

(1) Its social meaning is indeterminate. While the original shaming act might have been about shame, the following actions have unclear social meaning (Why did the banker type that? Was he reacting to her stealing? Or just bored? Or just mean?). Shame could also have nothing to do with why a person is called out.

(2) Its effects are uncalibrated. The low-cost, anonymous and endless nature of the Internet means that Ms. Smith’s shame goes on forever, which seems harsh punishment for the theft of a few sugar packets.¹⁰⁸

(3) Its accuracy is questionable. Viewers, including those in the restaurant, have no way of really knowing what is happening. Maybe Ms. Smith was given permission to take the salt, pepper, and sugar. Maybe she is abjectly poor and needs it to survive. Or maybe she really is just a hoarder. No process exists to determine truth, or between act and punishment.

This Part contains three stories that each illustrate some or all of the following qualities of online shaming or cyber harassment.¹⁰⁹ Though they are admittedly anecdotal, they are by no means isolated,¹¹⁰ and are valuable for what they can illuminate about modern online norm enforcement and the thin line between online shaming, harassment, and bullying.

108. See Lessig, *supra* note 11, at 662.

109. Paradoxically, popular press often refers to stories of this ilk as “public” shaming; in part because such stories involves “the public” (i.e. third-party) condemnation of seemingly “private” action between individuals. For the purposes of this Article I will adopt this language even though it refers to what the scholars *supra* Part I label as “private” or non-government shaming. What those scholars interchangeably call public, state, state sanctioned, or government shaming, I will simply call “state shaming.”

110. See *infra* notes 111, 124, and 132.

A. *Gene Cooley*¹¹¹

On September 11, 2008, Gene Cooley was at his job as a hairdresser when he got a call from local police informing him that his fiancée, Paulette Harper, had been murdered. Harper had been shot by her ex-husband—against whom she had a restraining order for previous incidents of violence—who had then turned the gun on himself.¹¹²

Cooley and Harper lived in Blairsville, Georgia, a small town of 650 residents in the north part of the state.¹¹³ Less than a week after Harper's death, a thread discussing the murder appeared on Topix, a local news and message board site.¹¹⁴ Participants on Topix message boards could post and comment on news items instantly, anonymously, and without moderation. Though starting off sympathetic, the comments on the thread about Harper's death had quickly turned derogatory, specifically in regard to Cooley.¹¹⁵

One user with the handle "Calvin" had insinuated that Cooley had played a part in the murder and that Harper's family was at risk. Another

111. Cooley's story is not isolated. See also Ulrike Dauer & Lisa Fleisher, *Former Formula One Chief Max Mosley Settles Legal Dispute With Google*, WALL ST. J. (May 15, 2015), <http://www.wsj.com/articles/former-formula-one-chief-max-mosley-settles-legal-dispute-with-google-1431702038> (former President of Formula One Racing successfully sues *News of the World* after paper published photos of him participating in group sex, which the paper falsely characterized as a "Nazi Orgy"); Ki Mae Heussner & Susanna Kim, *'Anonymous' Posters to Pay \$13 Million for Defamatory Comments*, ABCNEWS.COM (Apr. 24, 2012), <http://abcnews.go.com/Business/jury-awards-13-million-texas-defamation-suit-anonymous/story?id=16194071> (Texas couple successfully sues Topix.com users who published over 25,000 posts accusing them of being sexual deviants, drug users, and child molesters); A.G. Sulzberger, *In Small Towns, Gossip Moves to the Web, and Turns Vicious*, N.Y. TIMES, Sept. 20, 2011, at A1 (describing various people who have been slandered by false postings on Anonymous websites); Kashmir Hill, *Blaming The Wrong Lanza: How Media Got It Wrong in Newtown*, FORBES.COM (Dec. 12, 2012), <http://www.forbes.com/sites/kashmirhill/2012/12/17/blaming-the-wrong-landa-how-media-got-it-wrong-in-newtown/> (describing how in the immediate aftermath of the Newtown Elementary school shootings law enforcement officials mistakenly transposed the first name of Adam Lanza, the suspect and shooter, with his brother, Ryan, leading to Ryan Lanza's erroneous, immediate, and prolific vilification); Sarah Michael, *'OK People, Take a Look at This Creep!': Man Who Mum Shamed on Facebook Because She Thought He Was Taking Photos of Her Kids . . . Was Just Taking a Selfie in Front of a Darth Vader Display to Show HIS Children*, DAILY MAIL AUSTRALIA (May 8, 2015), <http://www.dailymail.co.uk/news/article-3073095/Mother-mistakenly-shames-dad-thought-taking-photos-kids-Facebook-post-shared-hundreds-actually-taking-selfie-Star-Wars-display-children.html#ixzz3hOVTgxnc> (woman posts picture of man on Facebook she mistakenly thinks is taking a picture of her children and suggests he is a child molester, post is shared over 20,000 times, man is questioned by police).

112. Complaint, *Cooley v. Ballew*, on file with author. See also *This American Life: Tarded and Feathered*, CHICAGO PUBLIC RADIO (Apr. 11, 2014), <http://www.thisamericanlife.org/radio-archives/episode/522/transcript>.

113. *This American Life*, *supra* note 112, at 2.

114. *Id.* at 2–3.

115. *Id.* at 3.

user “Mouth” added that Cooley could not be trusted around children and that he was a pervert. In comments on the thread, Calvin replied to Mouth, thanking Mouth for the warning. Someone else with the pseudonym “Bugs” wrote that Cooley was a heavy drug user and had cheated on his first wife extensively.¹¹⁶

In the days and weeks that followed, the comments continued to add up. Cooley was called a pervert, pagan, creep, child molester, adulterer, liar, drunk, and wife-beater. Users on Topix even suggested he was responsible for Harper’s murder, and then in the same breath, as if the ideas were of equal value, would mention Cooley had been fired from every job he had ever held.¹¹⁷

It is crucial to note that none of these allegations were true. Cooley had never used drugs, been accused of violence or excessive drinking, or practiced paganism, and he did not have anything in his past to suggest perversion.¹¹⁸ But in the small town of Blairsville, such idle remarks had immediate effect: Cooley was ignored by friends and acquaintances, at best, and at worst, called obscenities and not allowed into certain places of business.¹¹⁹ At work, all his clients stopped having him cut their hair, and the salon’s owner asked him, politely, to quit because his presence was driving away business.¹²⁰ The effect went outside the small town of Blairsville, too: Harper’s family in Florida had seen the posts, and stopped speaking with Cooley; Cooley’s grown children cut off contact upon seeing the posts.

Two and a half months after Harper’s death, Cooley had lost his family, friends, and his job, and he was unable to get another. After sixteen years in Blairsville, he left and moved to Augusta. He also hired an attorney, who successfully managed to subpoena Topix for the identities of the users who had defamed Cooley. Calvin, Bugs, Mouth, and a host of others all turned out to be the same person: a 52-year-old woman named Sybil Denise Ballew, who had briefly worked at the same local department store as Cooley in 1999.¹²¹ Cooley had no memory of Ballew, but Ballew remembered him well and justified her disregard for him based on the “way he looked at the younger girls in staff.”¹²²

Whatever her alleged justifications for libeling Cooley, in 2011 a jury awarded him a \$404,000 judgment for defamation of character and libel,

116. *Id.* at 3–4.

117. *Id.*

118. *Id.*

119. *Id.* at 9.

120. *Id.*

121. *Id.*

122. *Id.* at 8.

\$250,000 of which was punitive damages. Though Ballew has yet to pay on this judgment (it appears she is judgment-proof), the verdict has allowed Cooley to reclaim his life. He has repaired his relationships with friends and family and moved back to Blairsville, where he claims people treat him like nothing ever happened.¹²³

*B. Justine Sacco*¹²⁴

Justine Sacco, a corporate communications director at a large American Internet media company, was boarding a plane in Heathrow on her way to visit family in South Africa when she shot off a quick Tweet: “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”¹²⁵

Eleven hours later Sacco landed in Cape Town, and turned on her phone to learn she was “the No. 1 worldwide trend on Twitter.”¹²⁶ Though she had only 170 followers on her Twitter account when she had taken off, she now had tens of thousands of replies and responses to her AIDS tweet. The genesis of the outrage was an anonymous tipster to Sam Biddle, an editor at Valleywag, a subsidiary of Gawker Media. Biddle had retweeted Sacco’s offensive Tweet to 15,000 followers, and then written a brief post about it on the site titled “And Now, a Funny Holiday Joke from IAC’s P.R. Boss.”¹²⁷

In the mere hours it took Sacco to reach Cape Town, a literal mob had amassed on Twitter to track her flight and shame her in person. Rallied around the hashtag “#HasJustineLandedYet,” people around the world

123. Telephone Interview with Russell Stookey, Attorney for Gene Cooley (July 30, 2015).

124. Sacco’s story is not isolated. See also Cavan Sieczkowski, *Lindsey Stone, Plymouth Woman, Takes Photo at Arlington National Cemetery, Causes Facebook Fury*, HUFF. POST (Nov. 27, 2012), http://www.huffingtonpost.com/2012/11/20/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave_n_2166842.html (Lindsey Stone was shamed after taking picture in which she mock screams and displays her middle finger at sign asking for silence and respect at Arlington Cemetery); Jessica Durando, *Auschwitz Selfie Girl Defends Actions*, USA TODAY (July 23, 2014), <http://www.usatoday.com/story/news/nation-now/2014/07/23/selfie-auschwitz-concentration-camp-germany/13038281/> (Alabama teen shamed online for posting a selfie of herself smiling at Auschwitz); Daniel Engber, *Were We Too Hard on Jonah Lehrer?*, SLATE, Mar. 31, 2015 (high-visibility plagiarism story of Jonah Lehrer); *This American Life: Retraction*, CHICAGO PUBLIC RADIO (Mar. 16, 2012), <http://www.thisamericanlife.org/radio-archives/episode/460/transcript> (high-visibility plagiarism of Mike Daisey); Hilary Whiteman, *#WalterPalmer: From Hunter to Hunted—Internet Seeks Revenge for Cecil the Lion*, CNN.COM (July 29, 2015), <http://www.cnn.com/2015/07/29/world/cecil-lion-walter-palmer-social-reaction/> (global outrage on social media after Midwestern dentist travels to Africa and shoots beloved “celebrity” lion).

125. Sam Biddle, *And Now, a Funny Holiday Joke from IAC’s PR Boss*, VALLEYWAG: GAWKER (Dec. 20, 2013), <http://valleywag.gawker.com/and-now-a-funny-holiday-joke-from-iacs-pr-boss-1487284969>.

126. Jon Ronson, *How One Stupid Tweet Blew up Justine Sacco’s Life*, N.Y. TIMES MAG., Feb. 12, 2015.

127. Biddle, *supra* note 125.

tracked Sacco's flight, with one user going so far as to go to the Cape Town International airport to photograph and live-tweet her arrival.¹²⁸ Other users and the site BuzzFeed combed through her Tweets and compiled lists of previous offenses in a post titled, "16 Tweets Justine Sacco Regrets."¹²⁹ Her employer fired her and Sacco cut her family vacation short due to safety concerns (people were threatening to go on strike at hotels she was staying at and her movements were being publicly tracked). She returned to New York, jobless and isolated. Both applying for new employment and rebuilding a social life proved incredibly difficult because "we Google everyone."¹³⁰

Eventually Sacco left New York, volunteering as a public relations agent at an NGO in Addis Ababa, Ethiopia that worked to lower maternal-mortality rates. Though her negative Internet profile had not diminished, she eventually returned to New York to take a new public relations job—a move that was noted and mocked online. Though she has received a public apology from Biddle, Sacco acknowledged that she still felt personally humiliated.¹³¹

C. Jill Filipovic¹³²

A first year law student at New York University, Jill Filipovic was at her parents' house recovering from a wisdom teeth extraction over winter break when she was alerted that she was the topic of hundreds of threads at Auto Admit, an anonymous message board for law students.¹³³ Filipovic went to the webpage to discover hundreds of comments discussing her rape and murder.¹³⁴ A feminist writer who published her own blog, Filipovic was used to receiving harassing comments on posts, or even the occasional email, but the Auto Admit threads were different. "What freaked me out about Auto Admit was it was people claiming to have seen me in person,"

128. Ronson, *supra* note 126.

129. *16 Tweets Justine Sacco Regrets*, BUZZFEED (Dec. 20, 2013), <http://www.buzzfeed.com/jenvesp/16-tweets-justine-sacco-regrets-hxg7>.

130. Ronson, *supra* note 126.

131. *Id.*

132. Jill's story is not isolated. *See also* Michelle Goldberg, *Feminist Writers Are So Besieged by Abuse That Some Have Begun to Retire*, WASH. POST (Feb. 20, 2015), https://www.washingtonpost.com/opinions/online-feminists-increasingly-ask-are-the-psychic-costs-too-much-to-bear/2015/02/19/3dc4ca6c-b7dd-11e4-a200-c008a01a6692_story.html; Sean T. Collins, *Anita Sarkeesian on GamerGate: 'We have a Problem and We're Going to Fix This'*, ROLLING STONE (Oct. 17, 2014), <http://www.rollingstone.com/culture/features/anita-sarkeesian-gamergate-interview-20141017>.

133. Jill Filipovic, *Let's Be Real: Online Harassment Isn't Virtual for Women*, TALKINGPOINTSMEMO.COM CAFÉ (Jan. 10, 2014), <http://talkingpointsmemo.com/cafe/let-s-be-real-online-harassment-isn-t-virtual-for-women>.

134. *Id.*

Filipovic recalls. “Through blogging I’ve meant crazy commenters and harassers before, but these people were claiming that they were in my real life—my off-line life.”¹³⁵ Also daunting was the fact that Filipovic’s selection as a target for the hateful posts had no discernable link to anything she had said or done: “Apparently, it had been going on for many months, I have no idea how it began, even after I read all of the posts.”¹³⁶

Even though they existed “virtually” the Auto Admit posts had a dramatic effect on Filipovic’s life, and most immediately on her time in law school: she stopped speaking in class, wore hoodies to shield her face, and made no friends.¹³⁷ Online, Filipovic would obsessively and painfully monitor the threads, even though she understood it made the trauma continually worse.¹³⁸ And she would try to stop it: when a picture of her in a bikini was posted on one of the threads, she sent an email to Auto Admit requesting its takedown. “They refused,” she recalled. “And then they printed my email on the website.”¹³⁹

Finally, Filipovic sought justice from her online supporters calling for “personal-political collective action”:¹⁴⁰

Please feel free to copy any or all of what I’ve written here to your own blog in order to help change the top-ranked search engine results for Jill Filipovic. If you don’t have your own blog then please at least link to one of Jill’s post[s] listed below at your preferred social networking site and give it the tag ‘Filipovic.’¹⁴¹

The gambit worked, and by March 2007 top results for “Jill Filipovic” were again about her bio or articles, and the reputational threads had fallen off the page.¹⁴²

Still, to this day, Filipovic continues to get the occasional Google alert that she is again a topic at Auto Admit. Moreover, the long-term effects of the posting continue: “When I’d be at an event and people would glance at my nametag, I used to have a brief flash of panic. That’s gone away, but always being alert and on guard? That’s stayed.”¹⁴³

135. Telephone Interview with Jill Filipovic (July 27, 2015).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. CITRON, *supra* note 29, at 70.

141. *Id.* 70–71.

142. *Id.* at 71.

143. Telephone Interview, *supra* note 135.

III. RE-SHAMING THE DEBATE

To review: much of the appeal of shaming sanctions is that they would allow the state to piggyback on how society enforced its own norms. In practice, this would mean using the authority and voice of the state to put an offender into the public consciousness to be shamed. Under normal conditions, when a state punishes, it does three things:

(1) It gives an official social meaning to the punishment. The punishment is for stealing; or rape; or money laundering, etc.

(2) It calibrates the punishment. It designates what it will entail and how long it will last. Except in certain exceptions this is for a set period of time and when completed an offender can begin again.

(3) It strives for accuracy. A process is in place to attempt to discern whether the right person is being punished, whether the charges against them are true, and whether circumstances should enhance or mitigate punishment. While the process is far from perfect, it is present.

In the days before the Internet, Kahan and others imagined that government-issued shame punishment could bring these elements to normative punishments, and that normative punishments would also be curbed by natural limits: a trial or judge would determine the accuracy of your crime. Your crime would be publicized. If a yard sign was placed in your yard calling you a drunk driver, only a certain number of people in your small community, if they walked by, would witness and take part in your shame. The length of your punishment—apart from the actual public or literal stigmatizing—was proscribed by the weaknesses of human memory and the limited potential for mouth-to-mouth gossip. Shaming someone also took actual effort, and also put the shamer at risk himself. Kahan 2.0 was not wrong when he categorized shaming as less over-determined than prison: before the Internet, shaming was something quite specific.

But online shaming is different from the shaming imagined in the shame debate because the Internet places cultural participation and interaction in a new light.¹⁴⁴ Because of this, shame is a punishment meted out separately from any kind of government oversight or coordination. This means that the social meaning of shame can turn into harassment or bullying; the accuracy of shaming can be non-existent or questionable; and the Internet's endless memory, ubiquity, and ease of access can make punishment for a norm violation outsized and uncalibrated from the underlying offense. As analyzed here, the examples in Part II *supra* demonstrate that since the rise of the Internet, modern social-norm

144. Balkin, *supra* note 107, at 2.

enforcement has dramatically changed and now lacks reliable social meaning, calibration, and accuracy.

A. Indeterminate Social Meaning

Norms change.¹⁴⁵ They can change organically (taking a picture of yourself in public might have been normatively “vain” ten years ago, but “selfies” are now a fun, and commonplace practice); or they can change at the urging of laws and regulation (legal desegregation made it difficult for continued overt norms of racism to be accepted). But beyond the norms themselves the Internet has changed how norms are *enforced*, and what norm enforcement means. A top-down example will serve to illustrate the mechanisms in play in online norm violations:

Here is an example of a *norm*:

People should not say racist things.

And here is an example of an *act*:

White girl makes public statement that only black people get AIDS.

And here is the *social meaning* of that act in light of our norms:

White girl has violated norm that disfavors racism.

And here is an example of an *act of norm enforcement*:

Third-party writes blog post on news media site about white girl’s racist Tweet.

And here is an example of one *social meaning* of that third-party act:

White girl has violated a norm for Tweeting racist Tweet and should be shamed.

This chain of events demonstrates two things: first, that every act has a social meaning, as Lessig describes, but second, that *the very act of norm enforcement has a distinct social meaning*. While the social meaning of some acts of shaming might be relatively clear—writing a lengthy blog post

145. McAdams, *supra* note 39, at 391–92.

on how Sacco's words are a shameful example of racism today—many are not.

What is the social meaning of re-Tweeting a link to a lengthy blog post about a racist girl? It could be re-Tweeted out of boredom. It could be re-Tweeted to shame. It could be re-Tweeted out of misogyny. It could be re-Tweeted as a piece of humor. It could be re-Tweeted sadistically. It is impossible to determine the act's precise meaning from the act alone.

This indeterminacy is true of the vast majority of online acts of social norm enforcement—re-Tweeting a message; sharing a link; commenting anonymously on a blog; liking something on Facebook—the acts themselves are so small, discrete, and instant that they do not necessarily have a clear social meaning. But, as Part III.B explains, this does not curb their power.

B. Calibration

A central fear, expressed by almost all of the critics in the shame debate, was the uncontrollable, and unpredictable nature of shaming. This was stated in various ways, but perhaps best described by Whitman as the loss of “measured punishment” or “transactional dignity.”¹⁴⁶ Whitman predicted shaming would deprive offenders of such measured punishment by subjecting them “to the public's unpredictable response” and denying them “the dignity that comes from our right to pay off a debt once and for all and be done with our creditor.”¹⁴⁷ Thus, shame sanctions cede power to punish from the state to the mob, and in doing so surrendered all rational control over the effects.

With norms, however, the government does not have to cede the power—the public already has it. And while the public was always armed with its own tools and means of norm enforcement, the ready availability, low-cost, and anonymity of modern technology and the Internet has drastically changed whatever natural limits formerly conscribed shaming. The Lynch Mob imagined by Whitman, Massaro, and Nussbaum would be naturally constrained by geography, time, and expense. Before the Internet, shaming took time, money, and physical presence: someone had to show up to protest you, or see you walk by with a sign around your neck. People in Eugene, Oregon, were not going to get in a car and drive to Jackson, Mississippi to shame a drug dealer who dealt pot to elementary school kids. And people in Jackson had to make a calculation of being seen by others in their community if they decided to shame someone. In terms of time, money, and personal reputation, shaming was expensive.

146. Whitman, *supra* note 15, at 1090.

147. *Id.*

But the Internet, and access to it, has made shaming cheap, and as a result, an Internet Lynch Mob has no such constraints. To Sacco, Cooley, Smith, and Richards, the online reactions came in a tidal wave that felt like unified public condemnation. To them it was the entire world saying they were just *bad*; to the rest of the world, Sacco was just a millisecond of time and one more favorited Tweet; Cooley was just one more forwarded e-mail; and Smith was another “SMDH”¹⁴⁸ comment on a thread.

The same qualities about the Internet and technology that remove the limits on norm enforcement also amplify shaming’s effects. Not only can online shaming be a “tidal wave,” it can be a *never-ending* tidal wave. Months after Sacco’s life was upended by her Tweet, her online presence is still populated with public vitriol. Richards continues to fight a battle to reclaim her online reputation. Almost everyone mentioned in these examples lost their jobs or were forced to relocate because of online shaming. The punishments are both extreme and endless and seem deeply uncalibrated to the transgressions: a moment of mindless public racism; a private, vaguely sexist comment; a blog post calling someone out for being sexist. Endless public shaming and loss of livelihood seem like extreme consequences for such offenses—and they happen even when no offense has occurred, as Part III.C explains.

C. Accuracy

Ideally, when the state punishes, it has applied a process to determine whether the person being punished has in fact committed the thing for which they are being punished. No such measure exists in norm enforcement and the Internet’s ability to amplify social norm enforcement punishment is made even worse when there was no actual norm violation to cause it.

Such was the case with Cooley, who was libeled as a murderer, child-molester, and debtor. Though Cooley was innocent of such actions, the mere presence of these accusations of norm violation was enough to trigger online, and then real-life, shaming.

In comparison, there was no false or even proffered norm violation to explain the harassment Filipovic received. Her example effectively delineates the taxonomic difference of how the same actions (excessive online shaming) in one case should be considered online shaming or defamation, while in another the same action should be considered cyber harassment.¹⁴⁹

148. SMDH is an acronym typically used in social media contexts to stand for “Shaking My Damn Head.”

149. The importance of this delineation is discussed *infra* Part IV.

The stories of Cooley, Filipovic, and in some ways Richards also highlight how the Internet gives factional groups a disproportionate amount of power and visibility. Thus, the whims of a group of misogynistic teenage hackers or one irrational individual with a vendetta and a dial-up connection can be enforced at a much higher propensity and representation than they might actually hold in society. These groups can exact shaming punishments that tip-toe—*nay*, stomp—into realms of harassment and bullying. Moreover, their power can be—and often, is—unchecked. This is both because of anonymity but also because of a fear that any attempts to speak out against these groups will only turn their retributive gaze on you—as Filipovic found out in her requests to Auto Admit.

As demonstrated above, modern technology and the Internet have altered social norm enforcement and removed the natural limits, which once made shaming a relatively viable solution to norm violations. Instead, in this new era, shaming is an indeterminate, inaccurate, and uncalibrated form of punishment. Twenty years after legal scholars debated using shame as a tool of the state, the conversation has shifted to whether and how the state can best curb shaming. The next Part will look at how realizations from the shame debate, successful uses of online norm enforcement, and private remedies to inform the debate around state intervention.

IV. THE FUTURE OF ONLINE SHAME

While this Article has thus far focused on when online shaming goes wrong, there are some examples of when shaming goes right.¹⁵⁰ One such example is the online meme known as “manspreading.” The origins of the “manspreading” campaign are unclear. At least one blog, “Your Balls Are Not That Big,” has intermittent posts starting in September 2011.¹⁵¹ Another Tumblr, “Men Taking Up Too Much Space on the Train,” has archives starting in May 2013¹⁵² and countless Tweets featuring pictures of offenders hashtagged with “#manspreading” before *The New York Times* “officially” recognized the trend in December 2014.¹⁵³ But like many campaigns that take hold via social media, the exact naissance is a bit of a

150. For further discussion around the potential benefits of shaming see JENNIFER JACQUET, *IS SHAME NECESSARY?* (2015). See also DANIEL SOLOVE, *THE FUTURE OF REPUTATION* (2006) (arguing that some shaming can be positive when it gives voice to the generally-voiceless, as seen in consumer service forums or street harassment campaigns like Hollaback).

151. YOUR BALLS ARE NOT THAT BIG: ARCHIVE, <http://yourballsarenottatbig.tumblr.com/archive/2011/9> (last visited July 30, 2015).

152. MEN TAKING UP TOO MUCH SPACE ON THE TRAIN: ARCHIVE, <http://mentakingup2muchspaceonthetrain.tumblr.com/archive> (last visited July 30, 2015).

153. Emma G. Fitzsimmons, *A Scourge is Spreading. M.T.A.'s Cure? Dude, Close Your Legs*, N.Y. TIMES (Dec. 20, 2014), http://www.nytimes.com/2014/12/21/nyregion/MTA-targets-manspreading-on-new-york-city-subways.html?_r=0.

mystery—even though the movement’s message is surely not: men, it is not okay to sit with your legs wide open on public transit and take up more than your share of the train.

Though the name and early adoption of the meme has feminist overtones—creating awareness of how men often feel entitled to take up more public space than women—the complaint is also about a larger misuse or abuse of the commons. Using the hashtag “#manspreading,” public transportation riders across the world can draw attention to this violation. A typical post contains a picture, often only from the shoulders down, of a man guilty of such a violation combined with subject-relevant hashtags and occasional editorial comment.¹⁵⁴ Some blogs aggregate or curate such pictures posted on Twitter or Instagram; others recirculate pictures in a humorous way, adding photo-shopped images in between legs, and comical captions.¹⁵⁵

As a meme, manspreading was inherently viral and decentralized, but it was also powerful. In 2015, the Metropolitan Transit Authority, which oversees New York City’s subway system, released public service ads encouraging men to be more courteous with public space:¹⁵⁶



Dude...
Stop The Spread,
Please

It's a space issue.

The message, posted on subway cars and on subway platforms, was part of a larger “courtesy counts” campaign that was put forth by the MTA, which included other requests such as letting others off the train before

154. See e.g., Oliver Bjrkund (@OliverBjrkund), TWITTER (July 17, 2015, 4:18 PM), <https://twitter.com/OliverBjrkund/status/622138378247643136>; Parantha Alley (@ParanthaAlley), TWITTER (June 14, 2015, 9:57 PM), <https://twitter.com/ParanthaAlley/status/610264948581773313>; Siân de Freyssinet (@pinkyde), TWITTER (Apr. 21, 2015, 11:24 AM), <https://twitter.com/pinkyde/status/590536528478281728>.

155. SAVING ROOM FOR CATS, <http://savingroomforcats.tumblr.com/> (last visited July 30, 2015); ONE BRO TWO SEATS, <http://onebrotwoseats.tumblr.com/> (last visited July 30, 2015).

156. MTA: COURTESY COUNTS, <http://web.mta.info/nyct/service/CourtesyCounts.htm#DUDESTOPTHESPREAD> (last visited July 30, 2015).

getting on; giving a seat to the disabled, elderly, or pregnant; and not using the subway pole for dancing.

The manspreading meme is a great example of how online shaming can be used effectively, but this could be in part because it differs dramatically from the instances above in that it is not about shaming the norm violator, but instead, the violation. This addresses one of Nussbaum's main concerns with shaming: that the purpose of most online shaming is to isolate a norm violator by burdening them with a degraded identity.¹⁵⁷ Focusing the shame on the act eliminates the amplification of uncalibrated punishment, the conflation of the social meaning of the act with the violator, and minimizes the necessity of accuracy.

But the success of manspreading is certainly the exception. As shown above, online shaming can be, and often is, inaccurate, overdetermined, and uncalibrated. The following are current and potential solutions to these issues with online shaming.

A. Normative Conscriptions on Shaming

Just as shame is used to enforce norm violations, sometimes certain norm enforcement actions will violate norms themselves, and in turn be shamed. Using the structure from earlier, the following demonstrates how Richards's and Smith's story took just such a circular path:

Here is a *norm*:

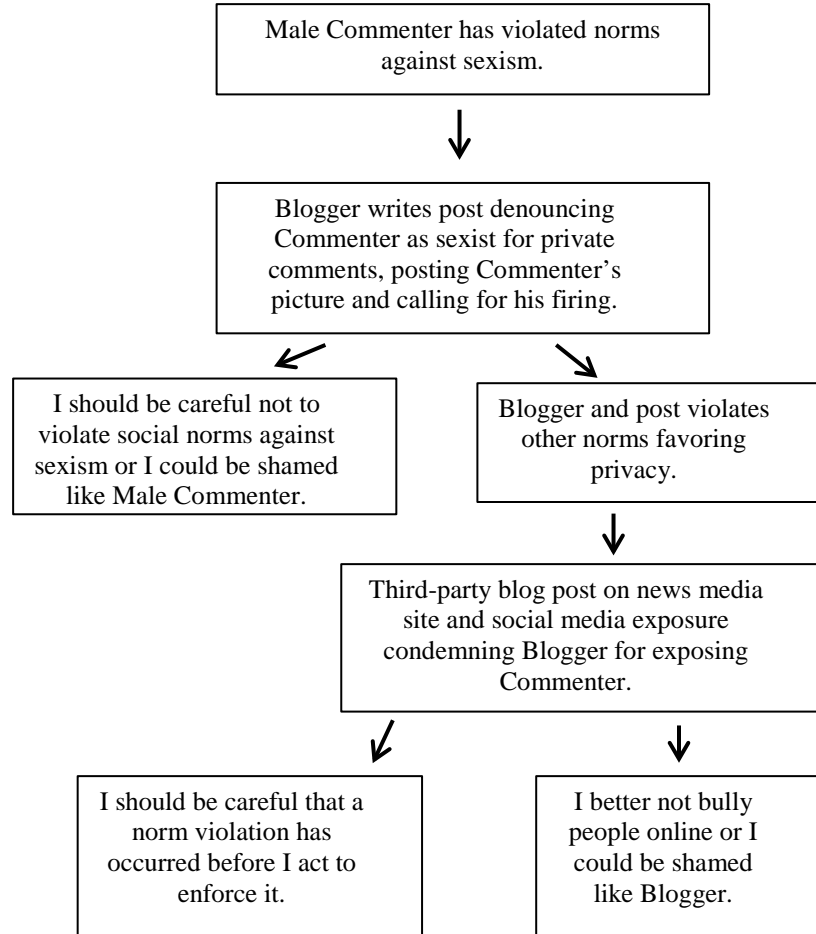
Sexism is bad.

And here is an *act*:

Private sexist comment at a public event.

157. NUSSBAUM, *supra* note 16, at 172–221.

And here is a chain of consequences stemming from the *social meaning* of that act:



Though Richards first capitalized on what she saw as a clear norm violation to shame the offender, but the legitimacy of the underlying norm violation (the statements were made privately, and perhaps not sexist at all) coupled with the amplitude and gravity of the shaming effects (Commentator lost job), triggered new norm violations and set into motion counter-norm enforcement (shaming). The result is a type of feedback loop to enforce norms even when the norm enforcement might be in conflict with the norm that was violated, even though shaming Richards might be a convoluted, somewhat ironic punishment for her supposed wrongful shaming of Smith. In this way, one might argue, norms are capable of

policing themselves, changing and issuing recursive punishments and updates in an ever-changing dynamic of enforcement and evolution.

But this would be a drastic oversimplification. Counter-norm enforcement does little to address or amend the underlying problems with online shaming, and in fact only builds on them. In Richards's case, for example, the social meaning of her online shaming might be that she violated a norm against privacy or it could simply be cyber harassment by a factional group. Moreover, shaming Richards does nothing to curtail or end the online shaming of Smith, and perhaps only adds to the indeterminacy of each party's shaming.

Thus, it is easy to see how trusting counter-norm enforcement to regulate norms entirely could easily lead to a scorched-earth scenario and a worsening of the online shame culture.

B. Legal Conscriptions on Shaming

Unlike with social norm enforcement, when the state punishes, it gives specific social meaning to the punishment, calibrates that punishment, and provides a process to attempt to ensure that the correct person and crime is being punished. These are all qualities that are missing from online shaming, so it might seem natural to look to the government for solutions, but that remedy is not without its own drawbacks. Part I.V.B.1 examines existing legal remedies and proposed legislation to curb online shaming, cyber harassment, and cyber bullying.

1. Defamation, Libel and Emotional Distress

It is worth immediately noting that one kind of legal remedy is already a relatively effective protection against unhinged shaming: defamation law. Cooley's story is a perfect example of this: though wrongfully shamed and forced to leave his small town, his eventual legal victory exposed his attacker and the lies on which his shame was built, and allowed him to return to his community, almost as if nothing had happened.

But a number of practical concerns limit the utility of defamation law as a way to curb shaming. Foremost, to sue for defamation, the statements made against the potential plaintiff must be false.¹⁵⁸ In Cooley's case, his shaming was based entirely on lies. This was a necessary element to him using libel as a remedy against his shaming. But had it not been—and until it was publicly exposed as such by a trial—Cooley's shaming was very similar to that seen by Sacco and Richards. Had the Topix postings against Cooley been anything other than baseless falsifications, if they had even

158. Truth is always a defense to defamation. RESTATEMENT (SECOND) OF TORTS § 581A (1969).

potentially contained elements of truth, Cooley's suit might not have been so successful. Moreover, as was the case with Sacco and Richards, it is often the offenders' true, self-publicized actions or words that lead to the shaming, making them ineligible for any kind of defamation relief.¹⁵⁹

Sacco, Richards and Filipovic¹⁶⁰ might have tort claims for intentional or reckless infliction of emotional distress with "extreme and outrageous conduct."¹⁶¹ Especially for Filipovic, the personal attacks, rape threats, and communication with her would potentially qualify as extreme and outrageous conduct because "it falls outside the norms of decency."¹⁶²

But litigation is a costly and timely remedy. Years can—and often do—pass before a case is settled or tried. In the meantime, the shaming can continue, or even accelerate. In Cooley's case, he left Blairsville for the years during which he sought to uncover his accuser and sue for defamation. Though his jury verdict restored his reputation, the defendant was judgment-proof, so Cooley will never be compensated for the time he lost to his online shaming. This, as well as issues with anonymous users, are often a problem with pursuing judgments against online harassers.¹⁶³

2. *Right to Be Forgotten or Information Privacy Speech Restrictions*

A libel judgment might be a type of remedy for the loss of procedural justice inflicted on Cooley, but what recourse would Sacco and Richards have for any kind of procedure or "measured punishment"?

One solution seems to be legal recognition of a new right—arguably a new norm—the "right to be forgotten."¹⁶⁴ The right to be forgotten "reflects the claim of an individual to have certain data deleted so that third persons can no longer trace them."¹⁶⁵ Though debated globally since the early 2000s, the right to be forgotten was only recognized as an established

159. The analysis for relief would also be different if the target of shaming happened to be a public figure. See RESTATEMENT (SECOND) OF TORTS § 581A (1969).

160. For cases like Filipovic or Richards where posters continuously updated online threads threatening rape and murder, criminal harassment charges might seem an obvious solution. But because much of their harassment was posted online and not directed to them specifically, the abuse falls outside most states' harassment laws. CITRON, *supra* note 29, at 143.

161. CITRON, *supra* note 29, at 121.

162. *Id.* at 122 (citing Benjamin C. Zipursky, Snyder v. Phelps, *Outrageousness and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011) and CITRON, *supra* note 29, at 133–34).

163. CITRON, *supra* note 29, at 122.

164. This, in some ways, might approach the "dignity" arguments espoused by Nussbaum and Massaro.

165. Rolf H. Weber, *The Right to Be Forgotten: More Than a Pandora's Box?*, 2 JIPITEC 121 (2011), <http://www.jipitec.eu/issues/jipitec-2-2-2011/3084/jipitec%202%20-%20a%20-%20weber.pdf>.

legal precedent in May 2014 by the European Court of Justice.¹⁶⁶ Since then, the scope of its enforcement has been widely debated, with major companies like Google resisting global application.¹⁶⁷ Though it might seem that the right to be forgotten is a natural solution to the fears created by excessive and unchecked public shaming, the right to be forgotten runs up against another highly-valued norm and legal protection: free speech. Thus, on the one hand, we increasingly value our privacy rights on the Internet, and on the other, the fear that protecting those rights could lead to censorship.¹⁶⁸

Professor Eugene Volokh has been at the fore of this debate. He argues that in recognizing a right to be forgotten—or a “right to control your communication of personally identifiable information about me”—we face the difficult problem of creating a “right to have the government stop you from speaking about me.”¹⁶⁹ Volokh spells out the future of the possible incantations of this right against American First Amendment law and associated free speech jurisprudence, ultimately concluding that any restrictions on speech around personal information would be “constitutional under current doctrine only if they are imposed by contract, express or implied.”¹⁷⁰ These exceptions would have to be drawn incredibly narrowly, in order to avoid “unintended consequences” to the right to free speech.¹⁷¹

But the *appeal* of the right to be forgotten remains intuitive and undeniable, arguably because we have now seen the power of unchecked public shaming.¹⁷² Information speech restrictions like the right to be forgotten are appealing because they speak to a new collective danger exemplified by Sacco and Richards: in going about your daily life, your actions might suddenly be held under a microscope, or broadcast to the world, and replayed on infinite loop. The battle between protection from this fear and loss of personal liberty and privacy is of course a familiar, and complicated, legal battle.

166. David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), <http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html>.

167. Alistair Barr & Sam Schechner, *Google Advisory Group Recommends Limiting ‘Right to Be Forgotten’ to EU*, WALL ST. J. (Feb. 6, 2015), <http://www.wsj.com/articles/google-advisory-group-says-limit-right-to-be-forgotten-to-eu-1423206470>.

168. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1050–51 (2000).

169. *Id.*

170. *Id.* at 1122.

171. *Id.* at 1123.

172. *Id.* at 1100 (acknowledging that information privacy speech descriptions were “viscerally appealing”).

C. *Purely Private Action*

Some of the private efforts of shamed individuals to reclaim their reputation and end their shaming demonstrate the power of private action to conscript shaming or cyber harassment.

The story of Filipovic is central here, as she was able to use the same qualities of the Internet that allowed strangers to harass her to recover her online presence. Of course, Filipovic had the advantage of already being a “public figure” online and thus being able to rally a faction of supporters to aid her, but businesses have sprung up to manufacture the same result. Reputation.com is one of the foremost online reputation management companies. “We believe individuals and businesses have the right to control how they look online,” states the Reputation.com’s “About Us” page. Their business model is a paid-for service that can be available to any business or public or private individual.¹⁷³ It works in a similar, but more sophisticated way to Filipovic’s approach: assailing search algorithms with new webpages, pictures, and text, in a “choreographed” way, to maximize the staying power of the new reputational information.¹⁷⁴

Issuing apologies are also moderately effective in curbing shaming. In Smith’s case, his apology for his sexist statement curtailed some of the vitriol, though it had the side effect of making Richards a new target for shame. But in the recent example of Walter Palmer, the Midwestern dentist who sparked global outrage after killing Cecil the Lion, an apology letter did very little to assuage the worldwide torrent of shame.¹⁷⁵

Such methods of reclaiming online presence are arguably effective, but they are not without limits.¹⁷⁶ Like litigation, such solutions are costly and timely, and they are also limited to the Internet—they can do little to nothing to repair real-world damage that happens as a result of online shaming.

D. *Refreshing and Re-Shaming the Debate*

Far from using shame as a governmental tool, there is now a growing sense that online shaming is something we want to control; but any regulation must be balanced against competing normative and legal values like free speech. As Danielle Citron writes in *Hate Crimes in Cyberspace*,

173. REPUTATION.COM: ABOUT US, <http://www.reputation.com/about-us> (last visited July 30, 2015).

174. RONSON, *supra* note 3, at 268.

175. Matt DeLong, *Read the Full Statement from Walter Palmer on Killing of Cecil the Lion*, STAR TRIBUNE (July 29, 2015), <http://www.startribune.com/read-the-full-statement-from-walter-palmer/318947551/>.

176. RONSON, *supra* note 3, at 263–74 (chronicling the use of Reputation.com by shaming victim Lindsey Stone, and demonstrating its apparent success).

“[a] legal agenda against cyber-harassment . . . can balance civil rights and civil liberties for the good of each.”¹⁷⁷ This is also true of legal reform around online shaming. Though there are not currently any absolute solutions to curtailing online shaming, we can learn much by considering online shaming within the framework of social norms and the shame debate, and the lessons of those who have been shamed.

1. New Taxonomies: Distinctions Between Online Shaming, Cyber Harassment, and Cyber Bullying

Though they are often conflated, online shaming, cyber bullying and cyber harassment are very different things. This Article began with a theoretical definition of shaming that appended “real or perceived norm violation” to the definition of harassment. As the examples in Part II *supra* show, this is an important distinction. Unlike the other people described, Filipovic and countless others like her violated no norms and were accused of violating no norms. The online shame, hate, and vitriol that surrounded them, destroyed their online presence, and upended their real lives was arbitrary, capricious, and committed by small factions of online users. Citron’s calls for reform to criminal stalking and harassment laws, de-anonymization of users and removal of Communications Decency Act Section 230 liability for the “worst offenders” of Internet sites, are all critical and measured proposals to solve the serious issues of cyber harassment and cyber bullying.

But where does Adria Richards fit in that taxonomy? It can certainly be argued that Richards violated a norm, but it could just as easily be argued that misogynist Internet factions targeted her like they targeted Filipovic. Richards is a victim of online shaming and cyber harassment. Her example demonstrates how easily and quickly events and normative enforcement can change on the Internet, and how rapidly it can deteriorate.

One thing is clear: Richards’s violation of a norm does not justify her cyber harassment. Nor does it justify her online shaming. The problems that arise in online shaming—inaccuracy, indeterminate meaning, and lack of calibration—are why it is an ineffective and intolerable punishment.

2. Shaming Acts, Not People

As Nussbaum argued in the shame debate, the danger of shaming is in ostracizing the norm-violator from society by marking them with a degraded identity (in the case of online shaming, a horrible Google history). But if you attach that stigma to an act, you can accomplish the same

177. CITRON, *supra* note 29, at 193.

effect—removing norm violation—without the problems caused by online shaming and the danger of sliding into the realm of cyber harassment.

Thus, manspreading was a successful use of online shaming because it targeted the act of norm violation rather than a specific person. This decoupling of norm violator from norm violation should be continued and encouraged in online shaming and in future regulation that might address online shaming.

3. *Best Practices for Action*

A successful defamation suit meant Cooley could return to his life as if “nothing had happened.” Reverse Google bombing and online reputation management have the power to finally end the shame meted out by the Internet’s infinite memory. These solutions work because they speak to the problems we have with public shaming. A defamation judgment is a powerful solution to shaming because it provides accuracy. It also uses the government’s power as a loudspeaker and trusted arbiter to counter the amplifying effects of the Internet. Online reputation management is effective because it can change what is being discussed and calibrate the punishment of online shaming.

Though these are seemingly disparate resolutions both in substance and procedure they are alike in a key way: neither of them involve censoring the shaming, but rather *adding* to the public action and thus changing and quelling its meaning. “The Internet is forever,” said Russell Stookey, the attorney for Cooley, “that’s what I tell all of my clients, that’s what I tell all of my children.”¹⁷⁸

So what would implementation of such a solution look like? The possibilities are wide-ranging. At the most broad: a governmental watchdog agency to oversee and administratively adjudicate Internet “dignitary” harms and issuing financial sanctions, or even simply letters of judgment that state an offender’s contrition and acknowledging the extent of their shame. This would harness both the government’s promise of accuracy and its power of publicity.¹⁷⁹ Such letters could be posted online by the shaming victims, or alternatively, a government-mandated notification could appear at the top of search results for a shamed person’s name, linking to the agency’s letter and a statement of apology to the victim. Alternatively, Internet Service Providers and major Internet companies like Google, Yahoo, and Twitter could implement their own internal agency to review online shaming and cyber harassment claims, though this is perhaps

178. Telephone Interview, *supra* note 123.

179. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

even more unlikely than a government watchdog group given the liability this would expose them to under current law.¹⁸⁰ Regardless, the additive nature of this solution makes it even more viable, as it addresses many of the concerns around the information privacy speech debate and the right to be forgotten. Those solutions favor government-facilitated takedown or removal of speech that is deemed offensive, an obvious anathema to free speech rights. Creating a process and system for publication would involve no level of censorship, but rather, an opportunity to change and inform the social meaning.

V. CONCLUSION

Online shame is problematic in large part because it is an inaccurate, indeterminate, and uncalibrated form of punishment. In creating a regulatory solution to online shaming, the framework of social norms, lessons of the shame debate, and viability of past remedies should be considered.

180. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act, 47 U.S.C. § 230 (1996). This case was seminal—though fleetingly—in that it held Prodigy Servers to be a publisher, and therefore liable for defamation, because it exercised editorial control over its published content. This precedent was undone by the Communications Decency Act which granted online service providers broad immunity “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4).